river, to the prejudice of our public improvements, as a wrong inflicted upon Pennsylvania, of which our State has great reason to complain, and which she is entitled to insist upon having redressed.

I am, very respectfully,

Yours, &c.,

THOS. E. FRANKLIN,

Attorney General.

RECENT AMERICAN DECISIONS.

In the United States Court of Claims.

J. ALEXIS PORT *vs.* THE UNITED STATES.

1. In all cases of the sale of personalty, there is an implied warranty of title.
2. Where the United States, while at war with Mexico, seized and sold certain tobacco as enemy's property, which subsequently proved to be otherwise, the purchase money paid by the vendee can be recovered.
3. The authority of military commanders in time of war considered.

The opinion of the Court was delivered by

GILCHRIST, C. J. — The facts in this case, as they are stated in the petition, are — that, on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to "sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." In obedience to this order, Captain Webster advertised, on the 16th of October, for sale, at auction, on the 19th of October, five hundred bales of tobacco. On the 21st day of October the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of $12,000, for which he paid $8,000 in cash, and gave the United States credit for $4,000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant and the United States, after the sale of the tobacco and the payment of the price by the claimant.

In this case there were all the elements necessary to constitute a contract. The United States and Mexico were at war. The American army was in actual possession of a considerable portion of Mexico, and, by the law of nations, had a right to seize the property of the Mexican government as lawful prize. Colonel Childs had, for the time being, supreme civil and military authority in the military department of Puebla, and in his then existing capacity he represented the United States, whose officer and servant he was. His authority, as the head of the army, could not be resisted; for this was especially a case where, from necessity, the laws must be silent in the presence of a victorious army.

The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by the writers on the law of nations. "When the sovereign or ruler of a State declares war against another sovereign, it is understood that the whole nation declares war against another nation." * * "Hence, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other." Vattel, b. 3, ch. 5, § 70. "Everything, therefore, which belongs to that nation, to the State, to the sovereign, to the subjects, of whatever age or sex—everything of that kind, I say, falls under the description of things belonging to the enemy." Ibid. § 73. "We have a right to deprive our enemy of his possessions, of everything which may augment his strength, and enable him to make war." Ibid. b. 3, ch. 9, § 161. "As towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on her property, and convert it to his own use." Ibid. § 164. "The property of movable effects is vested in the enemy from the moment they come into his power." Ibid. b. 3, ch. 13, § 196. As to movables captured in a land war, it has been sometimes stated to be merely requisite that the property shall have been twenty-four hours in the enemy's hands; but other writers hold that the property must have been brought *infra præsidia* — that is, within

the camps, towns, ports, or fleets of the enemy; and others have drawn lines of an arbitrary nature. Marten's Law of Nations, 290, 291; 2 Wooddes, Vin. L. 444, § 34. But, in respect to maritime captures, a more absolute and certain species of possession has been required, in order to obviate the right of postliminum, such as a sentence of condemnation, to give a neutral purchaser a title to a prize vessel.. Case of the *Flad Oyen*, 1 Rob. 134; 8 T. R. 270. "Immovable possessions, lands, towns, provinces, &c. become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the State, to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect." Vattel, b. 3, ch. 13, § 197. The conqueror who takes a town or province from his enemy cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. War authorizes him to possess himself of what belongs to his enemy; if he deprives him of the sovereignty of that town or province, he acquires it, such as it is, with all its limitations and modifications. Ibid. § 199.

In a condition resulting from a state of war, if property be seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities; but no action can be maintained, in a court of law, against the party who has taken it. In England no municipal court, whether of common law or of equity, can take cognizance of any questions arising out of hostile seizure. *Le Caux* vs. *Eden*, 2 Dougl. 573. So, if booty be taken under the color of military authority by an officer under the supposition that it is the property of a hostile State or of individuals which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his Majesty, and by his Majesty ultimately, assisted by the Lords in Council. There are no direct decisions on such questions, because, as was stated by Lord Mansfield, in *Lindo* vs. *Rodney*, Dougl. 313, they are cases of rare occurrence. *Le Caux* vs. *Eden*, Dougl. 592.

It is to be remembered that we are now examining this case upon

the supposition that the allegations in the petition are true, and the general question is, whether, supposing them to be true, a proper case is presented for the taking of testimony. The United States were in possession of a quantity of tobacco captured from the enemy during the war with Mexico. Under this general question, the first inquiry is, whether, when a person sells personal property in his possession, there is an implied warranty that he has a title to such property.

In most of, if not all, the cases in this country, wherever the question has been raised, it has been held that in every sale of personal property, there is an implied warranty of title. Some of the decisions to this effect are, *Defreeze* vs. *Trumper*, 1 Johns. 274; *Bayard* vs. *Malcom*, ibid. 469; *Rew* vs. *Barber*, 3 Cowen, 280; *Case* vs. *Hall*, 24 Wend. 102. In *Vibbard* vs. *Johnson*, 19 Johns. 78, it is said: "There is no doubt that in every sale of a chattel for a sound price there is a tacit and implied warranty that the vendor is the owner, and has a right to sell." In *Coolidge* vs. *Brigham*, 1 Metc. 551, the court said: "In contracts of sale, warranty is implied. The vendor is always understood to affirm that the property is his own. This implied affirmation renders him responsible, if the title is defective." In *Boyd* vs. *Bopst*, 2 Dall. 91, it was said by the court: "The possession of chattels is a strong inducement to believe that the possessor is the owner, and the act of selling them is such an affirmation of property, that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller." There are numerous other cases to the same effect, which need not be particularly adverted to for the present purpose. The same doctrine is stated in Story on Contracts, § 535, where numerous English cases are cited by the author in support of his position.

In 1 Law Reporter United States, 272, there is a careful and discriminating analysis of the decisions upon this point by Mr. Pike, of Arkansas, in which the writer comes to the conclusion that the law of England on this subject is like the civil law, and that there is an implied warranty, not of title, but of undisturbed possession and enjoyment. It is immaterial, in the present case, what is the

precise character of the implied warranty, whether it be one of title, or of peaceable possession only, because the United States were not only in possession and sold the property, but it has been taken from the possession of the purchaser, who is seeking to recover damages for the breach.

In judicial sales, where property is sold by the marshal under an order of court, it is held that no warranty is implied. *The Monte Allegre*, 9 Wheat. 644. But this was not a judicial sale. It was simply a sale by the United States, acting through their officers in an enemy's country, of property in their possession, to which they claimed a title by the rights of war; and we see no reason why they should stand in any better possession, in regard to property in their possession, than a private citizen. The sale was in obedience to an order from the commanding general to his military subordinate. We cannot regard the general as a court of law, or Captain Webster as an officer of a court; for this would tend to confound all the distinctions that exist between a state of peace and a state of war in regard to the rights of property.

If, then, there be nothing in the other facts in the case to alter or modify the conclusion, the claimant must be held to have established a right of action against the United States.

But the counsel for the claimant puts his case upon still another ground. He contends that the tobacco belonged to the United States by the rights of war and of conquest, that they sold it to him, and then took it away from him, making him thereby liable in damages to his vendors.

That, upon the facts stated in the petition, we must consider the tobacco as property captured in war by the army of the United States, we think there is no doubt. It was taken by an authority which, for the time being, was supreme. Mexico, so far as it was actually occupied by a competent military force, was, for the time, a conquered country. In the rights of conquest all ordinary civil jurisdiction and remedies were merged. In all that the commanding officer did, so far as he was justified by the law of nations, he represented the country by whose authority he was in command of a military force. It was by this authority, under the law of nations,

that the tobacco must for the present be considered to have been captured, also that it was the property of the enemy. When captured, it was not the private property of the captor, but it became the property of the sovereign, according to Vattel — in this country, of the United States. The people, acting through the only agents who could, from the necessity of the case, be recognized — that is, the officers in command — sold it to the claimant, who paid the consideration for it. It then became *his* property, and, after such a sale and payment, the United States had no greater right to take the property into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee, on the ground that he had no right to sell it.

It appears from the petition, that, after the sale of the tobacco, the petitioner was informed that it was claimed by a merchant of Puebla, by the name of Domerq, and that a board of inquiry was convened by order of General Lane, consisting of four officers of the army, for the purpose of examining into the matter, a majority of whom reported that the tobacco was not at the time of the sale the property of the United States, and they awarded the possession and ownership thereof to Domerq, and that the consideration paid by the claimant should be returned to him, which was accordingly done. Subsequently, upon its being reported to General Lane that the last buyer of the tobacco refused to give up the key of the store-house, an officer and a file of men forcibly seized and delivered the tobacco to Domerq.

This must be considered as the act of the United States. It stands on the same ground with the sale of the tobacco. The United States, through their officers, were in the actual possession of the supreme civil and military authority. With such a responsibility upon him, the commanding officer must, *ex necessitate*, act with promptness and decision. In a state of war, where the ordinary tribunals are silent, a nation must expect to incur the risk of pecuniary liability for the acts of its officers in a foreign country, whose course of conduct must be determined by what seems best under existing circumstances. It would be unreasonable in the

extreme to require of military officers carrying on war abroad, placed in difficult and trying positions, either the experience or the legal skill that would enable them to appreciate the subtle distinctions which at home and in a time of peace are applied to the ascertainment of legal rights. It is a necessary consequence of a state of war, that the orders of the general can admit neither of argument nor resistance. It is the *nation* that carries on the war, and not the individual officer; and it follows that the nation must be liable for the acts of such agents as it sees fit to employ in the prosecution of its object.

Our conclusion is, that if the allegations in the petition are proved, the claimant is entitled to some damages from the United States. Whether the claimant is entitled to recover any sum beyond the consideration paid by him, by reason of his liability to subsequent vendees, is a question which can more conveniently be examined when all the evidence relating to damages is laid before us. At present, we shall merely order testimony to be taken.

In the Surrogate's Court of the City of New York.

HUNT vs. MOOTRIE.[1]

In the matter of proving the last Will and Testament of BENJ. F. HUNT, deceased.

1. Where the decedent failed to declare to the subscribing witnesses that the paper which they were called to attest was his last will and testament, but simply acknowledged his signature, and requested them to sign at a particular place pointed out by him—*Held*, that this was not a valid testamentary declaration.
2. The knowledge of the character of the instrument gained by the subscribing witnesses from looking at the attestation clause, does not constitute a testamentary declaration by the decedent, unless it was clearly obtained by his request or direction, or at the least, his consent and privity.
3. If anything is to be taken as substitution for an express declaration, it must be such an act as is clear and unequivocal, and as gives the basis of a necessary inference that the testator conveyed, intended to convey, and knew he had conveyed to the minds of the witnesses, that he executed the paper as his last will and testament.

[1] We are indebted to the courtesy of Mr. Surrogate Bradford for this interesting case.

4. There must be mutuality as to the knowledge of all the parties, testator and witnesses, in respect to the nature of the transaction, and this must be evinced with reasonable definiteness by the facts.
5. The declaration must be made to each of the witnesses, at the time of subscribing or acknowledging, and as part of the transaction; it must be made in the presence of the parties, and must point to the particular instrument in process of execution.
6. Wills of real estate are governed, so far as relates to the forms of execution, by the law of the place where the land is situated.
7. Where the decedent made his will at Charleston, in South Carolina, where he then had his domicil, according to the forms prescribed by the laws of that State, and subsequently removed to the city of New York, where he died—*Held*, that the will so made was valid as to personalty, though not solemnized in conformity to the laws of this State.
8. In the continental jurisprudence, the rule that the act is valid if performed according to the *lex loci*, is universal in respect to a testamentary disposition of movables.
9. Where the *lex loci actus* and the *lex loci domicilii* are both conformed to, so far as relates to the forms of the testament, a subsequent change of domicil to a place where other forms are required, will not invalidate the instrument.
10. The statutes of this State recognize the validity of foreign wills of personalty made according to the *lex loci actus*, and do not admit of a revocation to be effected by a change of domicil.

D. P. Hall and *D. D. Field*, for executor.

William Mootrie, and *M. G. Harrington*, for contestants.

THE SURROGATE.—The will propounded for probate, bears date the 14th day of August, 1849; was executed in the city of Charleston, South Carolina, where the decedent then resided. The petition for probate states, that the decedent at, or immediately previous to the time of his death, was an inhabitant of the county of New York. Assuming that to be the fact, two points arise—first, whether the will was executed according to the laws of the State of New York; and secondly, if not, whether if made according to the laws of South Carolina, it was a valid will at the decedent's death.

The will was attested by three witnesses, and the usual ceremonies appear to have been performed, except the testamentary declaration, the proof as to which is alleged to be deficient.

The testimony was at first taken under a commission issued to Charleston, and subsequently two of the witnesses came to New

York, and were personally examined before me. Heckmann, one of the witnesses who was not re-examined, says, he was requested by the decedent at the time of the execution "to witness his signature to a paper;" that "he was called upon at that time and place by Col. Hunt, to witness a paper, but Col. Hunt did not state what it was;" that "Col. Hunt acknowledged the signature and seal to the paper;" "he made no declarations to witness as to what the paper to which he acknowledged his signature was;" "Col. Hunt said nothing about his will or witnessing his will." "Col. Hunt said nothing about the nature or contents of the paper;" that he "signed the paper without knowing what it was—never knew until recently told;" "Col. Hunt made no declarations in the presence of witness—he merely acknowledged his signature, and requested him to sign as a witness;" "he heard no declaration from Col. Hunt." These repeated answers to repeated questions touching a testamentary declaration, put it beyond all question, if any evidence can, that no declaration as to the nature or character of the instrument was made to this witness by the decedent. Heckmann also testifies, that only one other person was present in the office with Col. Hunt, and that he was not acquainted with that person. He also says, "he knows nothing" about the signatures of the other witnesses, and that "nobody signed it" in his presence.

Mahoney in his testimony under the commission, says he "signed his name to the paper;" that Messervey requested him to go to Col. Hunt's office, and he there "signed the paper" in the presence of the decedent and of Messervey, but cannot remember whether Heckmann was present—"thinks Messervey said Col. Hunt wished witness to sign his name as witness to his will, but this statement was not in the presence of Col. Hunt, and Col. Hunt said nothing as to what the paper was;" simply acknowledged the signature and seal, without saying what the paper was;" "thinks that the others signed at the same time with him;" "knows that he was witness to some paper or instrument of writing which Messervey had told him was Col. Hunt's will; but cannot say that Col. Hunt did anything more than acknowledge the signature and seal, and request the witnesses to sign their names at the places where they are written;"

"he did not declare what the paper shown to witness was, he merely requested him and the others to sign the same as witnesses;" that "he was in the habit of calling upon witness to act as a subscribing witness to written instruments, but never told the nature or contents of such papers to witness;" that "he knew nothing about the contents of the paper when he signed it—Col. Hunt said nothing about them to witness,"—"said nothing to witness as to what the paper was which he desired him to subscribe." Messervey when examined under the commission, stated, that he was the clerk of the decedent—was called into the office where B. F. Hunt was present, and was asked by the decedent to "subscribe his name to the paper," which he did, there being "no other person present at the time of his signing;" that "he knew" at the time it was decedent's will, "but that Col. Hunt did not tell witness it was his will;" that he subscribed his name in the presence of the decedent, "but not in the presence of John Mahoney and Adolph Heckmann, or of either of them;" that "Col. Hunt acknowledged his seal and signature;"—that the will is in the handwriting of the decedent; that "Col. Hunt was in the habit of calling on him to witness written instruments, but not of telling him of their nature or contents; that "Col. Hunt never did tell him of the nature or contents of any instrument of writing which witness was ever called upon to witness; but that he knows from conversations between Col. Hunt and his son B. F. Hunt, jr., just previous to the execution of the will and his subscription as a witness, that the will so subscribed, was the will of Col. Hunt; and also that Col. Hunt knew that witness knew that said instrument was the will of Col. Hunt;" that "he thinks he was present when Mr. Mahoney signed, at the request of Col. Hunt—he called Mr. Mahoney to witness the will."

On the return of the commission under which this evidence was taken, it seemed to me the testimony disproved a testamentary declaration; but upon its being urged that there was a possibility of a declaration having been made by the reading of the *testatum* clause, I allowed the proponent the opportunity of a further inquiry.

On his examination before me, Messervey testified, that the

decedent requested him to go below and get "two witnesses to the will." This is I think in conflict with his testimony under the commission. He also says, that Col. Hunt pointed out the spot where the witnesses were to put their names, and that he acknowledged his signature. Messervey further testifies that he the witness read the *testatum* clause.

Mahoney on being recalled stated, that Messervey, on the day the will was executed, called on him, and said that Col. Hunt wished him "to witness his will,"—that on proceeding to the place, the paper was lying on the table —he looked over it "about a minute," —the decedent then stepped up, acknowledged the signature, and then "pointing his finger to the place where my name is written," said, "see here, sign your name there." This witness also says, he glanced over the attestation clause, and the instrument was a will. I do not perceive that the case is helped any by these new or further statements of Messervey and Mahoney. All the witnesses agree that the decedent did not declare the instrument to be his will at the time of the execution—that so far as his words are concerned, he used no expression indicative of the nature of the instrument, whether it was a will, deed, or any other document; that he simply acknowledged his signature, and requested the witnesses to sign at a particular place pointed out by him. These then were all the acts performed by the decedent. The knowledge of the character of the instrument gained by the subscribing witnesses from looking at the attestation clause, does not constitute a testamentary declaration by the decedent, unless it was clearly obtained by his request or direction, or at the least, his consent and privity. If anything is to be taken as substitution for an express declaration, it must be such an act as is clear and unequivocal, and as gives the basis of a necessary inference that the testator conveyed, intended to convey, and knew he had conveyed to the minds of the witnesses, that he executed the paper as his last will and testament. There must be mutuality as to the knowledge of all the parties, testator and witnesses, in respect to the nature of the transaction. We cannot spell out, and guess at this mutuality. It must be evinced with reasonable definiteness by the party. There is not enough in

the proof to satisfy me, that Col. Hunt had reason to know that the witnesses were aware the paper was his will, or that he wished them to know that. Messervey, it is true, says, the decedent requested him to go below and procure witnesses to his will, but that request was made before any one except himself had attested; and although he may have communicated that request to the other witnesses in the same words, it would not supply the defect of a testamentary declaration to the witnesses in person. The declaration must be made to each of the witnesses at the time of subscribing or acknowledging, and as part of the transaction. It must be made in the presence of the parties, and must point to the particular instrument in process of execution. I am of the opinion, therefore, that this instrument was not executed in conformity with the provisions of the statutes of this State. As wills of real estate are governed, so far as relates to the forms of execution, by the law of the place where the land is situated, this instrument is not valid so as to affect lands in the State of New York: and it cannot be admitted to record as a will of real estate. But the question still remains, whether it is to be treated as invalid as a will of personalty.

In the State of South Carolina, the formalities requisite to the due execution of wills, were regulated by the Statute of Frauds, (29 Car. 2 ch. 3; Statutes S. C., vol. 6, p. 382,) until the year 1825, when a stricter rule was adopted, requiring the instrument to be signed by the decedent, and to be attested by three witnesses. Statutes S. C., vol. 6, p. 238.) At the time of its execution, this will was made in a form sufficient to carry real and personal estates, according to the law of the place where it was made, and where the decedent was then domiciled. It was a good and valid instrument, duly executed in conformity with the laws which then regulated the act. But a most interesting question arises as to the effect upon the validity of this instrument by a change of the decedent's domicil to the State of New York. I find at the outset the great authority of Justice Story against the validity of a will, which though made under such circumstances, does not conform to the law of the testator's domicil at the time of his death. He says, "But it may be asked, what will be the effect of a change of domicil, after a will or testament is

made of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicil at the time of his death? The laws in which the general rule is laid down, would seem sufficiently to establish the principle, that in such a case the will or testament is void; for it is the law of his actual domicil at the time of his death, and not the law of his domicil at the time of making his will or testament of personal property, which is to govern." The distinguished jurist cites John Voet in support of this proposition; but the passage cited from Voet, relates only to the question of testamentary capacity, and not to the forms of the instrument. The case he puts is this: if one living in Holland, where a testament may be made at fifteen years, should make his testament, and then changed his domicil to Utrecht, where full puberty (eighteen years) is required in a male testator—his testament as to movables would be rendered void by the change. The same thing would occur, he says, if one should institute his wife heir in a country where that was lawful, and then change his domicil to a place where it was not lawful. It is manifest that the observations of Voet touch only upon the point of testamentary capacity, and not upon the forms and solemnities required for the valid execution of a testament. It is impossible, indeed, he should have intended to apply the rule as to the effect of a change of domicil, to testamentary forms; for he himself is one of the strongest supporters of the doctrine that in respect to forms, *locus regit actum*, and in sustaining it, he has gathered a most formidable array of authorities. (Voet, De Statutis, lib. 1, §§ 13, 14, 15.) He shows, that it is a rule of universal recognition, even as against the *lex domicilii*, unless indeed, it appears that the law of the domicil has been avoided by fraud. He says distinctly on this very case:—*Adeoque si Hollandus in Hollandiâ de prædiis Ultrajectinis testamento disponat, effectum sortiri debet voluntas ejus, quia observavit solennia loci in quo actus testandi celebratus fuit. Nec infirmabitur ex eo quod forte post conditum ita in Hollandiâ supremum elogium Ultrajectum migret; cùm enim peregrini cujusvis in Hollandiâ reperti, ibique more Hollandico testantis, voluntas etiam post reditum in patriam rata*

maneat, si nihil aliud impediat iniquum foret, migratione solâ ad locum alia solennia desiderantem, interrumpi actum in prioris domicilii loco solenniter ante celebratum.—(Liber 28, tit. 1, § 27: *qui test. fac. poss.*) It would be unjust, he says, that a will executed in Holland according to the solemnities there required, should be broken solely by a change of domicil to a place, whose laws demand other solemnities. I proceed now to show that this is not the opinion of Voet alone. Van Leeuween, commenting upon the subject, has this passage,—"Hence this question has arisen whether a will made according to the practice required at the place where it is effected, as in Holland for instance, having been duly confirmed before a notary and two witnesses, ought likewise to take effect in other places, where other and more numerous solemnities are required, as in Friesland the number of witnesses required is seven, * * and upon the general opinion of the doctors, it was understood that a will confirmed at a certain place according to the solemnities required there, takes effect everywhere without distinction, because the solemnity required to the existence of anything, belongs to the knowledge and jurisdiction of the government of that place where it ought to be observed. And if a person be obliged to follow the practice of different places, any person who lives now at this and then at another place, would be obliged to make so many wills, or to observe different forms in one and the same will; and a will, which is but a single act, would be judged of according to different forms of law." (Com. p. 215.) Grotius says; "*Ubi de formâ sive solemnitate testamenti agitur respici locum conditi testamenti.* (Epis. 467, in 4 Burge. Com. p. 220.) Dumoulin states the rule very broadly—"*Est omnium doctorum sententia ubicunque consuetudo vel statutum locale disponit de solemnitate vel formâ actûs, ligari etiam exteros, ibi actum illum gerentes, et gestum esse validum et efficacem ubique, etiam super bonis soli extra territorium consuetudinis vel statuti.*" Dumoulin cited Story's Confl. Laws, § 441. M. Toullier says,—"*Enfin il faut observer que la forme des testaments ne dépend ni de la loi du domicile du testateur, ni de celle des biens qui sont donnés, ni de celle du temps où le testateur vient à décéder. Elle ne dépend que*

de la loi du lieu *et du* temps *de la confection du testament.*" (Le droit Civil Français, vol. 5, p. 290, § 382.) Thus Dumoulin declares, that by the consent of all the learned, the local custom governs the form of the act; and M. Toullier, that the form does not depend upon the law of the testator's domicil, nor of the *situs* of the goods, nor of the time of the testator's death, but upon the law of the place, and of the time of the execution of the will. M. Duranton also states, that the form of the testament is regulated by the law of the time when it was made, and shows that in this respect the rule differs from that which prevails in regard to the testator's capacity. (Cours de droit Français, vol. 9, p. 15, § 14, 15, 16.) M. Felix in his Conflict of Laws, says,—"*Un principe aujourd' hui généralement adopté par l'usage des nations, c'est que la forme des actes est reglée par les lois du lieu dans lequel ils sont faits où passés.*"—*Conflit des Lois*, cited by Story, Confl. of Laws and note, p. 727.) Merlin defines the following distinctions, "in regard to testaments, there are three things to consider—the capacity of the person, the disponobility of the goods, and the form of the disposition. The first is governed by the law of the domicil, the second depends upon the situation of the goods, and the third is governed by the law and custom of the place where the disposition is made." He adds, "it is needless to recall the disputes which were raised upon this point by the old civilians—it is many years since they were finished; and now"—"*tout le monde convient unanimement quela forme de tester depend du statut, ou de la coutume du lieu où l'on teste.*" All the world agree unanimously that the form of making the testament depends on the law, or the custom of the place where it is made. (Répertoire Universel et raisonné de Jurisprudence, vol. 34, p. 111, Guyot, tom. 16, p. 167.) In the reasoning of M. De Voisins upon the testament of M. De Pommereuil, the grounds of this rule are carefully elaborated—such as the necessity of counsel, the difficulty or impossibility of practising other forms, the ignorance of other forms, the variety of forms, the necessity of adopting one, and the convenience of adopting that of the place. He says, "*les nations en sont convenues, et elles vivent aujourd'hui entr'elles sur la foi de cette règle.*" (Merlin,

Art. Testam.) Pothier speaking on this subject, says,—"The testament in France, ought to be made in the form prescribed by the law of the place where it is made, although the testator has not his domicil in that place, and was there only temporarily,—that although there would appear to be more difficulty in regard to testaments made by a Frenchman in a foreign country—foreign law not being received in France; nevertheless, "*néanmoins les arrêts les ont jugés valables: parce que c'est une règle du droit des gens de se conformer, pour la forme des actes, aux lois du lieu où on les passe*"—they have been adjudged valid, because it is a rule of the law of nations to conform in respect to the forms of acts, to the law of the place where they are effected. Œuvres de Pothier; Nouvelle edition, par M. Dupin. tom. 10. Coutumes, tit. 16, §§ 2, 5, 11. I suppose it impossible to find a single authority among the Continental jurists of the highest character impeaching the doctrine sustained by the authors I have cited, so far as it applies to movables. M. Felix criticises the opposing opinions of three modern authors who question the rule, with entire success. Besides the authorities I have quoted, Vattel, Sande, Peckius, Paul Voet, Christinæus, Rodenburg, Vinnius, Boullenois, Bouhier, and Huberus agree to the principle, and most of them press its application even to immovable property. It is recognized in the codes of Louisana, France, the two Sicilies, and Sardinia; and is the law of Spain, Holland and Germany. (Jurisprudence du XIXme siècle, par M. M. Sirey et de Villeneuve, pp. 1022–26–40. Code Napol. Art. 99. Concordance entre les Codes Civiles Etrangers et le Code Napoleon, par M. de Saint Joseph Burge, Com. p. 585.) It has such universal acceptance, that Pothier emphatically styles it a rule of the law of nations. Thus according with the usage of civilized nations, and the concurrent opinion and judgment, and enlightened reason of the most eminent civilians, it remains to consider how far it has been adopted by the common law. And in this connection it may be observed, that to adopt the *lex loci actûs* as to the form of the will, does not necessarily oppugn the *lex domicilii*. The law of the domicil undoubtedly governs in cases of testacy and intestacy, both alike; but then the inquiry arises, what is the law of the domi-

cil in the particular case? The adoption of the *lex domicilli*, is itself a concession to foreign law upon principles of public convenience, national comity, and right reason; a concession which has been made, justified, and sustained by an appeal to the common consent of nations and the authority of jurists. In determining what is the law of the domicil in any given case, where the local law is not positively settled by legislation, there would seem to be no good reason why a similar deference should not be paid to the *jus gentium*, and the opinions of learned men. It appears from the authorities I have cited, that the rule *locus regit actum*, has been generally received, perhaps not so much as an exception to the law of the domicil as a part of that law itself—so that in the adoption of the *lex domicilii* in this class of cases, it may reasonably be inquired why we should not take it with its universally accepted modifications.

In *Potinger* vs. *Wightman*, 3 Merivale, 67, on a question of succession and domicil, and the law of England being silent on the subject, Sir William Grant observed "on the subject of domicil, there is so little to be found in our own law, that we are obliged to resort to the writings of foreign jurists for the decisions of most of the questions that arise concerning it." It may be well to see whether the precise point in controversy in the present case, has been adjudicated in the English or American tribunals. In the case of the Duchess of Kingston, her will of personal estate, executed at Paris according to the English, but not according to the French forms, was admitted to probate in the Ecclesiastical Court. (Cited in *Curling* vs. *Thornton*, 2 Add. 21.) Justice Story says she was domiciled in France, Mr. Burge, that she had not relinquished her English domicil; but probably no stress was laid on that point, as she had obtained Letters Patent from the French king, giving her the same power of devising as she would have had in England. The opinion of M. Turgot in favor of the validity of the instrument, was based on the supposition of an English domicil—and proceeded on the principle, that although the solemnities of the *lex loci actus* were not observed, the will would be good if conformed to those of the domicil.

In *Stanley* vs. *Bernes*, 3 Hagg. 373, codicils were rejected, because not made in conformity with the forms of the Portuguese

law, which was the *lex loci actûs et domicilii.* The deceased was domiciled in Portugal, and the codicils were executed there. This was the decree of the High Court of Delegates reversing the judgment of Sir John Nicholl. The grounds of the reversal do not appear; but in a subsequent case, Sir Herbert Jenner stated, that the principle decided was, "that if the instrument be not executed according to the law of the domicil of the testator, it is invalid." He says, "The Court of Delegates having reversed the sentence of the Prerogative Court, it follows, (though no reasons are given by the court for its decision,) that the two codicils were pronounced against, on the ground that they were not executed according to the law of Portugal, where the testator was domiciled." (*De Bonneval* vs. *De Bonneval*, 1 Curteis, 856.) This conclusion is, I think too broad, for the codicils were not executed according to the *lex loci actûs;* and it would be quite as sound a deduction, looking only at the case itself, to say, that they were rejected for that reason, as for the other reason. In the case last above cited, the Marquis De Bonneval left a will executed in England, conformably to the English law; but having his domicil in France, Sir Herbert Jenner determined that the validity of the will must be determined by the French tribunals, and for that purpose suspended proceedings. In *The Countess De Zichy Ferraris* vs. *The Marquis of Hertford*, 3 Curteis, 468, the testator left a will and a large number of codicils—some of the codicils were not executed according to the statute, (1 Vict. c. 26,) and one of them was executed at Milan, where the testator frequently resided, and had an establishment. The testator being domiciled in England, Sir Herbert Jenner Fust held, that this codicil was invalid, making the following observations:—"It is not pleaded that the late Marquis was domiciled at Milan; it is only pleaded that he was resident there, as a visitor, as he might have been in any other country, and therefore merely a temporary resident, having his domicil in this country, and therefore he was liable to the law of this country with respect to his testamentary disposition. The law of Austria, it is pleaded, would give effect to this codicil, as the act of a foreign resident there, and this may be perfectly true; but if the law of Austria would give effect to the

paper, it does not follow that this court could decree probate of the paper, unless it can be shown that the domicil of the party was in thóse dominions, and not in the dominions of England, because the domicil of the Marquis was in England: for it is too late now to contend that the succession to personal property, either in cases of testacy or intestacy, is to be governed by any other law than the law of the country in which the deceased had his domicil. In the case of succession to the personal estate of an intestate, the cases are too numerous for the court to entertain any doubt that the succession is governed by the law of the domicil; and if there had been any doubt whether the succession to personal property in a case of testacy is governed by the same rule, such doubt would be removed by the decision of the Court of Delegates, in the case of *Stanley* vs. *Bernes*. It was there decided that a British born subject who had domiciled himself in Portugal, was bound in the disposition of his property, to conform to the law of the country in which he had become so domiciled; and although in that case he had expressed an intention of returning to this country, yet, as he died in Portugal, a domiciled Portuguese subject, the court held, that his will could not be valid unless executed according to the laws of the country in which he was domiciled. Therefore, that case disposes of the whole question as to succession in cases of testacy, deciding that a will, to be valid, must be executed according to the law of the country where the party was domiciled; and following that decision, I am bound to administer the law as I found it laid down by the Supreme Court, as the law of the country; and I am consequently of opinion, that the circumstance of the paper having been written and executed by the late Marquis at Milan, can give no effect to the paper, it not being executed according to the law of the country in which it is admitted he had his domicil." It thus appears, that on the authority of *Stanley* vs. *Bernes*, where the codicils were *not* executed in conformity to the *lex loci actûs*, the learned judge rejected a codicil which *was* executed according to the *lex loci actûs*. In the absence of the reasons of the court in *Stanley* vs. *Bernes*, it is impossible to say what general doctrine was laid down as applicable to cases of this character, for the facts

before the court only called for a sentence in rejecting papers which conformed neither to the law of the domicil nor to the law of the place where they were executed. It is obvious that the question in *Stanley* vs. *Bernes*, did not arise on a testament made with the solemnities required by the *lex loci actûs*, though deficient in those required by the *lex domicilii*. (4 Burge, 589. See *Curling* vs. *Thornton*, 2 Add. 6; *Hare* vs. *Nasmyth*, 2 Add. 25; *Craige* vs. *Lewin*, 3 Curteis, 435; *Collier* vs. *Rivaz*, 3 Curt. 355; *Maltass* vs. *Maltass*, 1 Robert. Ecc. 67.) Nor does it appear in the case of the Marquis of Hertford, how far the judgment of the court would have been affected had the testator been domiciled at Milan, at the time the codicils were made; though if the doctrine inferred from *Stanley* vs. *Bernes* be strictly applied, it would seem to exclude wills executed according to any other forms than those prevailing by law at the testator's domicil at the time of his decease. This case was taken before the Judicial Committee of the Privy Council (3 Notes of Cases, p. 150); and the decision below affirmed on the principle, that the English statute of wills, is to be construed as applying to the testamentary acts of all domiciled Englishmen, wheresoever done.

I am not aware, however, of but a single decision avoiding a will, made in pursuance of the forms required by the testator's domicil at the time it was made, but not in conformity to the solemnities demanded by the law of his domicil at the time of his death. The effect of this change of domicil does not appear to have been considered judicially, save in the case of *Nott* vs. *Coon*, 10 Miss. R. 543, where it was determined, that a will made in another State by a person then a resident of such State, but who afterwards removed to Missouri, and died a resident thereof, was invalid, not being made according to the law of Missouri. The grounds of this judgment do not appear—nor whether the will related to real estate or to personal. In *Desesbat* vs. *Berquier*, 1 Binney, 336, the decedent was an inhabitant of St. Domingo, at the time of making the will and at the time of his death; and the instrument though sufficient in form to pass personal estate in Pennsylvania, was declared invalid. But it was not valid by the law of St. Domingo, and there-

fore conformed neither to the *lex loci actûs*, nor to the *lex domicilii*. In *Grattan* vs. *Appleton*, 3 Story, 755, the decedent was domiciled in the province of New Brunswick, and made certain testamentary papers at Boston. The law of his domicil was held to control, and the papers were declared invalid. Returning to the English cases, we find in *Price* vs. *Dewhurst*, 8 Simon, 279, 4 My. & Cr. 76, a conjoint will made in 1807, by a husband and wife lately removed from a Danish colony, revoked by posterior wills of both parties made in England, where they were domiciled. In *Frère* vs. *Frère*, 5 Notes of Cases, 595, the will was made in England according to the English form, by a person domiciled at Malta, and it appearing that by the law of that island the *lex loci actûs* governed, the will was admitted. In *Moore* vs. *Budd*, 4 Hagg. 346, the decedent made his will in Spain, where he was domiciled; and it was rejected, not being conformable to the *lex loci actûs*, nor to the *lex domicilii*. In *Thornton* vs. *Curling*, 8 Simon, 310, there was no question as to the forms of executions—but Lord Cottenham intimated, that the provisions of the will, which was made in England by a British subject domiciled in France, contravening the civil Code, by providing for an illegitimate child to the exclusion of a widow and a legitimate child, might be disregarded by the Court of Chancery.

The precise question then in this case has not been determined. If it is to be tested by the general doctrine, that the law of the domicil at the time of the death, governs universally,—a principle which seems to be laid down in many of the cases,—then, although this point has never been directly passed upon, we still have a rule applicable to its solution. The English courts have undoubtedly come to the conclusion that the rule, *locus regit actum*, does not govern as to the forms of wills. The case of the Marquis of Hertford settles that point definitely. Whether the law of the domicil at the time of the death, will ever be applied where the domicil has been changed since the execution of the will, so as to effect the revocation of a will valid at the date of its execution, remains to be seen. There seem to be just reasons why a change of domicil should not produce such a revocation. The form is not attached to the person, but to the thing done—it is inherent in the body of the

act, which when performed with all the solemnities required by the law of the place where it is done, and by the law of the testator's domicil at the time, is a consummate and perfect transaction. The will is then a complete and valid instrument by whatever rule tested. It has an actual, integral existence. It is a will in due form. Is it to be changed by a change of abode?—is its validity to fluctuate with the migratory habits of the maker, and to depend upon the contingency of his residence at the time of decease? or originally performed with all lawful ceremonies, does it stand good once for all, unless revoked by the express act of the party? The *lex domicilii* has been adopted in England, and the *lex loci actûs* rejected; and it is supposed this determination is commended by reasons of simplicity; but in the nature of things, there does not seem to be more difficulty or complexity in determining one than the other. Either rule leads to the adoption of foreign law, and of necessity to its examination. I do not understand the *lex loci actûs* to be carried to the extent of governing the transaction, but simply that if executed according to that rule it may be good, though defective according to the *lex domicilii*. A will executed according to the law of the domicil at the time of the death, should be held good under all circumstances. Though defective according to this rule, if it still be conformable to the *lex loci actûs*, the continental jurists sustain its validity. If at the time of its execution it be made in harmony with the solemnities required by the law of the place where it was made, and where the testator was then domiciled, I can perceive no good reason in the nature of things, why it should be revoked by a simple change of residence of the maker to another country where other forms are required. The transaction is a perfect and valid act, by the common consent of the continental authorities; and in the absence of any authoritative decision repugnant to this view, their conclusions as well as reasoning, command my assent and judgment. It is not without interest as to this subject of revocation, to observe, that our statute seems to contemplate wills executed with other forms than those prescribed by our own law; and in declaring how wills shall be revoked in writing, uses such general terms as embrace other forms,—not giving any par-

ticular mode of revocation, but simply requiring the revocation to be "executed with the same formalities with which the will itself *was* required by law to be executed." Now, Col. Hunt's will was required by law to be executed in the precise way in which it was in fact executed—and was then a perfect and legal will. And how has it been revoked? By a change of residence? There is not a word in all our statute of a revocation effected in that mode; and if not, if this will was valid when it was made, and if no will in writing can be revoked, except in the cases and in the mode required by our statute, how then has this will been revoked? But there is another portion of our law, which appears also to be in harmony with the liberal usages of those countries where the customs and doctrines of the civil law prevail. At the revision of our statutes, a mistake was made in not providing for the proof of wills where the witnesses were out of the jurisdiction of our courts. This was remedied by the amendatory Act of 1830 (2 R. S. p. 67, §§ 63, 64, 65, 66, 67), and the Chancellor was authorized to issue a commission for the purpose of taking proof in such cases; but these provisions apply only to wills executed according to the laws of this State. Another section provides for proving before the Chancellor "wills of personal estate, duly executed by persons residing out of this State, according to laws of the State or country *in which the same were made;*" and then the succeeding section declares, that, "no will of personal estate *made out of this State, by a person not being a citizen of this State,* shall be admitted to probate under either of the preceding provisions, *unless such will shall have been executed according to the laws of the State or country in which the same was made.*" (§§ 68, 69. *In the matter of Roberts' Will,* 8 Paige, 446.) These provisions appear to adopt the *lex loci actûs,* in the case of persons domiciled abroad: although as I have indicated elsewhere, they do not exclude the operation of the law of the domicil, except in the particular modes of probate recognized in these sections of the statute. (*Isham* vs. *Gibbons,* 1 Bradford, 77.) I think the fair construction of these provisions makes these sections applicable to persons residing abroad *at the time of the execution of the will;* and in such case recognizes the law of the place where the act was

performed, as a proper criterion and guide in respect to the formality of the act—not as the only criterion, but as *one* which the law is willing to adopt in view of the special modes of probate prescribed in the statute. If that interpretation be reasonable and just, the policy of our law is sufficiently declared in this branch of the statute. In view then of the state of the continental law and of the *jus gentium;* in view of our own statute, as well in regard to revocations as to the recognition of the *lex loci actûs*, just stated; in view of the fact that the will in question was made conformably to the law of the place where the decedent was domiciled at the date of its execution; and in the absence of any authoritative ruling on the precise point involved, I conclude in favor of the validity of this instrument as a will of personal estate, and must direct sentence of probate accordingly.

In the Court of Chancery of New Jersey—February, 1855.

JOHN R. PAUL *vs.* ABEL YOUNG.

1. Where A and B exchanged farms, A agreeing to pay B one thousand dollars, in addition to the farm which was to be conveyed to him, and the wife of A refuses to unite with her husband in the conveyance, which refusal is by the contrivance of A, the court will not deprive B of the benefit of a specific performance of the contract, and will refer the matter to a master to settle the conveyance, so as to afford B complete indemnity.
2. Where a complainant, on the faith of an agreement with the defendant, has put himself in a situation from which he cannot extricate himself, this circumstance will induce a court of equity to give him relief.
3. Where a court of equity will decree a specific performance.

The bill alleges that the defendant is the owner of a farm supposed to contain one hundred and seven acres, situated in the township of Oxford, in the county of Warren, in the State of New Jersey; that on or about the 14th of December, 1854, the complainant applied to him to purchase his farm; and that after some negotiation it was agreed between them, that if the complainant would

purchase of J. Elias Butz his farm of about the same number of acres, the defendant would exchange his farm for the Butz farm and a thousand dollars difference; that at the request of the complainant, the defendant went to consult his wife and family, and, on returning, said they would all assent to the arrangement; that the complainant then went and purchased the Butz farm; and being obliged to leave immediately for his home in Philadelphia, he authorized his brother, as agent for him, to enter into a written agreement with the defendant for the exchange of farms; that his brother as his agent and the said defendant, on the same day, executed an agreement in writing, by which it was agreed that on the first day of April, the said complainant should convey, free and clear of all incumbrance, the Butz farm to the defendant, and that on the same day the said defendant should convey to the complainant the said farm, then owned and occupied by the said defendant; and further, that the said difference in exchange should be $1,000, which the said complainant agreed to pay to the defendant; the bill alleges that the wife of the defendant expressed herself satisfied with the agreement; that on the first of April the complainant was ready on his part to fulfill the agreement, and tendered to the defendant a deed for the Butz farm, signed by himself and wife with full covenants; and that on the same day the defendant tendered to the complainant a deed for his farm, but that the deed was not signed by the wife; that the defendant pretended his wife could not execute the deed; that the complainant then offered to take the deed without the wife's joining in the conveyance, provided the defendant would indemnify him on the Butz farm against any claim of dower which the wife of the defendant might be entitled to hereafter, or by giving him other satisfactory security.

The bill prays that the said defendant may be decreed specifically to perform the said agreement, by a proper conveyance with his wife, or that he be decreed to make compensation for the value of the wife's incumbrance, to be deducted from the purchase money; or, if more agreeable to equity, that the covenants of the defendant for incumbrances be declared a lien on the Butz farm, as

an indemnity against any right or claim of dower which may hereafter be made by the defendant's wife.

The defendant answered the bill, and depositions were taken by both parties.

The defence set up will appear fully by the opinion of the Chancellor.

P. Kennedy and *W. L. Dayton*, for complainant.
J. H. Norton and *J. S. Neville*, for defendant.

WILLIAMSON, CH.—There are several grounds upon which the defendant resists a decree for specific performance. I shall notice them in the order in which they were presented on the argument.

1. It is objected that the wife is not a party to the bill, and that no decree can be made against her to execute the deed, as she is not a party to the suit. No decree could be made against her if she were a party. If she had actually signed the agreement with her husband, it would have been absolutely void as to her, and no suit at law or equity, could be maintained against her upon such an agreement. A *feme covert* cannot make any contract, either with or without the consent of her husband, except as to her separate estate, in respect either to real or personal property. Our late statutes respecting the rights of married women, do not affect this principle of the common law. Had she been made a defendant, a demurrer as to her would have been sustained. (*Worden et al.* vs. *Morris and Wife*, 2 G. C. R. 66; 2 Kent. 141; 12 Mad. Ch. 261; 6 Wend. 13; 2 Jac. & Walk. 412.) The necessary and proper parties are therefore before the court.

2. That the defendant, on the day specified in the agreement, was ready to perform it, and tendered to the complainant a deed for his farm, which the complainant refused to accept. The defendant was bound to give to the complainant a deed for the farm free and clear of all incumbrance. The complainant was entitled to a deed executed by the defendant *and his wife*. A deed executed by the defendant alone, was not a compliance with the agreement. The complainant was not bound to take such a deed. This was the deed which was tendered to him. But it was argued that the defendant

run no risk by taking such a deed; that this being a mere exchange of properties, a court of equity would not, under the circumstances, ever have permitted the wife to claim her dower in both properties. But why not? The court could not, upon any principle of equity, prevent her taking her dower in the land conveyed by her husband to the complainant. It is that very right which she is now maintaining, and which it is contended this court has no right to impair, by a decree against her in this case. Suppose she claimed her dower, too, in the land conveyed by this complainant to her husband. That would be a question between her and the heirs at law of her husband, in which this complainant could have no possible interest; and it is difficult to conceive how any legal or equitable resistance could be made to such a claim, by reason of anything connected with this transaction. It was further said, that the deed was a substantial compliance with the agreement, because it contained a covenant to indemnify the complainant against any future claim the wife might make, and it is shown that the defendant is a man of property, and his personal covenant a sufficient indemnity. This is no answer to the objection to such a deed. The complainant offers to take a sufficient indemnity, but no court would say that the mere personal covenant was sufficient indemnity against such an incumbrance.

3. A want of mutuality in the contract is urged as an objection against a decree. It is said, the agent who signed the contract for the complainant, was not legally authorized, and so the defendant only was bound by it; and as the defendant could not, for that reason, compel a specific performance by the complainant, the parties were not mutually bound, and that in such case a court of equity will not decree a specific performance. There is some conflict of authority upon this point. It was considered by the court in the case of *Lanning* vs. *Cole* (3 G. C. R. 229), and some of the authorities are there referred to by the Chancellor. It is evident his leaning was against the objection. He did not decide the point, however, as the case turned upon other considerations. Most of the authorities on the point are referred to and reviewed by the Master of the Rolls in *Morris* vs. *Mitchell*, 2 Jac. & Walk. 425.

The opinion of the Master of the Rolls in that case, is unsatisfactory. It is not referred to by Chancellor Kent in *Benedict* vs. *Lynch*, 1 J. C. R. 373, although much later than any of the authorities referred to by him. The contract is undoubtedly binding on the defendant at law; and if the court refuses to compel a specific performance, it is simply on the ground that the want of mutuality renders it more equitable that the party should be left to his legal remedy.

It is no legal, unyielding obstacle to the court's making a decree, that the contract is signed only by one of the parties. In that sound, legal discretion, by which a court of equity exercises this branch of its jurisdiction, it frequently does refuse to decree a specific performance of a contract which is not mutually binding on both parties; not, however, because it is a settled principle that the court will not enforce such a contract, but because that want of mutuality often constitutes an equitable ground for such refusal. As if the party not signing the agreement, and therefore not legally bound, takes advantage of his position, and delays its fulfillment, till it is ascertained whether the bargain is advantageous to him; now, though the performance of the contract, if he had been bound, could not have been resisted by reason of the delay, yet the court will now consider it good ground enough by reason of the want of mutuality in the contract. But even admitting, that as a general rule the objection is a good one, there are circumstances in this case which would make it inequitable and oppressive on the complainant for the court to enforce it. It is proved, and indeed admitted by the answer, that the complainant purchased the Butz farm, for the sole purpose of carrying out this contract, and that he was encouraged and urged by the defendant, to make the purchase. He has made a large expenditure there, relying upon the good faith of the defendant. To turn him over to the law under these circumstances, would not only give him an inadequate remedy, but be permitting the defendant to practice a fraud upon him. The naked question is not therefore presented in this case, whether a want of mutuality is a valid objection against the court's decreeing a specific performance. The conduct of the defendant has been such as to deprive

him of the benefit of the principle, if, as a general one, it is recognized in equity. The complainant brings himself within the language of Lord Redesdale, in *Lawrenson* vs. *Butler*, 1 Schoales & Lefroy, 19, a case always cited to sustain the objection under consideration. The complainant on the faith of this agreement, has put himself into a situation from which he could not extricate himself. That circumstance is sufficient to induce a court of equity to give relief.

4. The principal ground upon which a decree is resisted, is, that when the agreement was entered into, the defendant supposed that his wife would execute the deed, but since she has resisted all his reasonable persuasions, and now refuses, it is rendered impossible for him to perform his contract; the court ought not, under such circumstances, to make a decree against him to do that which is out of his power to do.

In examining the evidence of the case, it is impossible to resist the conclusion that the defendant has acted in bad faith in this transaction, and that the unwillingness and refusal of the wife to execute the deed is more in compliance with the wishes of her husband than her own disposition and unrestrained judgment. There is enough evidence to show that the complainant was unwilling to enter into the contract until the wife of the defendant was first consulted, and gave her assent; and that, notwithstanding the denial in the answer, she did assent to the contract. She gave her reasons why she considered the bargain an advantageous one to herself and husband. It is proved that the defendant declared his determination to *back out*, as he expressed it. His position is not one to ask any favor of the court, or to give him the benefit of a doubtful principle to which fair and upright dealing might justly lay a claim.

But the fact is, the wife now refuses to execute the deed; and it is necessary to its validity that she should sign it, and acknowledge, before the proper officer, that she signed, sealed and delivered it as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband. If the court decrees a specific performance according to the terms of the contract, the husband must procure his wife to sign the deed in some way, *per fas aut nefas*,

or else take the consequences of disobedience to the order of the court. This then is, in effect, a decree by which the wife is forced into executing a deed. When she is brought before the proper officer, he certifies to her acknowledgment of its being her free and voluntary act, when it is notorious that it is the decree of this court, held up to her *in terrorem*, which must be either obeyed by her husband through her submission, or he be subjected to punishment for disobedience. Such a decree is against the policy of the law protecting the rights of a wife in the lands of her husband. It is plain to be seen, that this mode of alienation might be adopted by an improvident and oppressive man, to strip a prudent wife of all the reliance for her future support. Her refusal to sign a deed, would be easily overcome, by her husband entering into a contract that she shall join him in a conveyance; and then a decree of this court is looked to as the instrument of her oppression. She may have firmness enough to resist his unreasonable demand and entreaties, but yield to the persuasion of a decree of this court, which threatens her continued refusal with the incarceration of her husband. Upon an examination of the authorities, it will be found that the doctrine is not as firmly established as a cursory view of them might lead us to suppose.

Judge Story (Story Eq. 732) pointedly and emphatically condemns the doctrine—that a court of equity will decree the specific performance of an agreement, by which the husband covenants that his wife shall execute a conveyance to bar her of her estate, when performance is resisted on the ground of the wife's refusal to join in the deed. The authorities are referred to, but the author does not give his opinion, whether they are such as should lead to the conclusion, that the doctrine should be considered as settled by authority either way.

The case of *Hall* vs. *Hardy*, (3 P. Wms. 186,) was a bill for the specific performance of an award by which the plaintiff was to pay £10 to the defendant on such a day, and £30 at another day; and that thereupon the defendant should procure his wife to join with him in conveying the premises to the plaintiff and his heirs. *The answer did not set up the refusal of the wife.* The Master of the

Rolls says, "there have been a hundred precedents, where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it." And yet the note to this very remark of the Master of the Rolls, (note B, page 188,) leaves it quite uncertain as to the extent these hundred precedents carried the doctrine. "Because in all these cases, it is to be presumed, that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose. So said by the Master of the Rolls, in the case of *Winter* vs. *Devereux*, Trinity, 1723; and that the interest in such covenants has been taken to be an inheritance descending to the heir of the covenantee. *But, after all, if it can be made appear to have been impossible for the husband to procure the concurrence of his wife* (as suppose there are differences between them,) surely the court would not decree an impossibility, especially where the husband offers to return all the money, with interest and costs, and to answer all the damages." (Note B, referred to.) But here is the very point we want precedent for—the court's making a decree for the defendant to do an impossibility—*to control the will of his wife* and *compel* her *voluntarily* to execute a deed; for the deed is worthless except done of her *free* will. There is no difficulty, where the defendant does not set up the refusal of his wife as a defence. But where the refusal is set up as a defence, and it appears by the evidence that such refusal is the reason why the defendant does not perform his covenant, for this court to make a decree which *compels* the wife to execute a deed, and then to accept it as a free will offering, is carrying the jurisdiction of the court very far.

The case of *Barry* vs. *Wade*, Rep. Temp. Finch, 180, I have not seen; but the book is admitted not to be very reliable authority. In *Barrington* vs. *Stone* (2 Eq. Abridg. 17, pl. 8), the decree was, that the husband should procure his wife to join with him in a fine to the plaintiff, according to his covenant. The answer set up that the wife did not seal the deed, but not her refusal to join with her husband in a fine.

In *Otread* vs. *Round* (4 Vin. Ab. 202, pl. 4), Lord Cowper refused to decree a specific performance of such a covenant, the husband offering to refund the purchase money with costs. The case as cited in Viner is as follows: "Husband and wife did, upon a valuable consideration, by lease and release, convey the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser. The wife refused to levy a fine. The plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited where a specific performance had been decreed in the like case; but the Chancellor would not decree a specific performance in this case, because upon such decree the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the said cited case."

In *Emery* vs. *Ware* (8 Ves. 505), Lord Eldon refuses his assent to the doctrine carried to the extent of the court's making the decree in the face of the refusal of the wife; and in *Martin* vs. *Mitchel* (2 Jac. & Walk. 418), Sir Thomas Plumer, Master of the Rolls, decides these points: that a husband and wife having a joint power of appointment by deed over the wife's estate, agree in writing to sell it, a decree for specific performance cannot be compelled against them; and under a contract by husband and wife, for sale of the wife's estate, the court will not decree him to procure her to join. He remarks: "The point that the court should compel the husband to coerce the wife to join with him in the conveyance, was abandoned. The counsel did not urge that *that* is the law now, and that the husband was to go to prison, if she refuses to concur."

Upon a careful examination of all the authorities, if the alternative were presented to me of making a decree for specific performance by procuring the wife to join in the deed, or to dismiss this bill, I should accept the latter.

I am, however, relieved in this case, from denying the complainant relief on account of any such embarrassment. The complainant offers by his bill, in case of the refusal of the defendant's

wife to join in the deed, to take *indemnity*. The power of the court to direct indemnity is denied. The case eminently calls for its exercise, and I do not think it can be denied upon authority or principle.

In the case of *Milligan* vs. *Cooke* (16 Ves. 1), for the plaintiff it was stated that he desired not a reduction of the purchase money, but an indemnity against the risk, which must not be a personal idemnity, but upon real estate, or by part of the purchase money to be kept in court; the defendant taking the dividends. Lord Eldon said, the purchaser was entitled to that; that the proper compensation was indemnity, by which the loss, if it should happen, would be made good; and if it did not happen, there was no occasion for compensation. A reference was made to a master to settle such security by way of indemnity, as, under all the circumstances of the title, it should appear just and reasonable that the defendant should execute. Upon an intimation of the Lord Chancellor the case was re-argued, and the decree was affirmed. I cannot find that, by any subsequent case, the propriety of this decision of Lord Eldon has been questioned.

In *Balmanno* vs. *Lumley*, (1 V. & B. 224,) Lord Eldon confined the order to compensation, and is reported to have said he did not apprehend the court could compel the purchaser to take an indemnity, or the vendor to give it. He certainly did not mean to question the correctness of the principle upon which he had made the decree in *Milligan* vs. *Cooke*. The manner in which both those cases are referred to, in a note to *Patton* vs. *Brebner and another* (1 Bligh, 67), shows that they were not considered in conflict, or that the latter overruled the former; but that, while it is a general rule that courts of equity will not compel a vendor to give an indemnity, there is no inflexible rule or principle to prevent the court's doing it, when a proper case presents itself. If there is anything in the reasoning that a court of equity cannot, upon principle, decree an indemnity because the parties have not contracted for it, it would equally apply against the jurisdiction of the court to award compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate. In

Graham vs. *Oliver*, (3 Beav. 124,) Lord Langdale says: "There is, however, a very great difficulty in all these cases, and I scarcely know how it can be overcome; though a partial performance only, it has been somewhat incorrectly called a specific performance. The sentiments of Lord Redesdale, on this point, as expressed by him in two cases before him, are strongly impressed on my mind. The court has thought it right, in many cases, to get over these difficulties for the purpose of compelling parties to perform the agreements into which they have entered; and it is right they should be compelled to do so, where it can be done without any great preponderance of inconvenience."

In the case before the court, if it is beyond the reach of its jurisdiction to decree indemnity, then it has not the power to do what is manifestly equitable and just between the parties to this contract; and the complainant must submit to a fraud, without any adequate means of redress. Indemnity can be ordered in this case, not only "without any great preponderance of inconvenience," but without any inconvenience at all. As the case is presented, it is the very remedy which suggests itself, as the proper and natural mode of administering equity between the parties, and is free from every objection as to hardship or inconvenience. The defendant need not be called upon to give *collateral* indemnity, but it may be obtained in settling the mutual conveyances to be made between the parties.

By the terms of the agreement, the complainant is to convey to the defendant the Butz farm, and pay him one thousand dollars, as the consideration for the premises which the defendant has agreed to convey to the complainant. The wife of the defendant refuses to unite with her husband in the conveyance; and this refusal is owing entirely to the contrivance and fraud of the defendant, who, in this way, is endeavoring to deprive the complainant of the benefit of a specific performance of the contract. The court should order this agreement performed; and the conveyances to be so made between the parties, that the complainant may hold, in the land which *he* conveys, an indemnity against any future claim to be set up by the defendant's wife.

I shall decree a specific performance, and a reference to a master, with directions to settle the conveyances; and if the wife of the defendant refuses to join her husband in a deed, then to direct the conveyances in such manner as will afford the complainant a complete indemnity in the premises.

In the District Court of Philadelphia—April, 1855.

DAVIS *vs.* OBERTEUFFER.

1. General release discharges land from a condition not to build in a particular manner.
2. Pleading over admits that the release operated as averred.

Trespass quare clausum fregit. Pleas—1, not guilty and issue; 2, that one Samuel W. Fisher was the owner of a large lot on Chestnut street, including the *locus in quo*. That by indenture, in 1813, (profert) he conveyed the *locus in quo* to one Israel Maule, subject to the following conditions, to wit: "That no building should be erected on a certain part of the lot beyond a height of ten feet, and if any building should be erected contrary to the intent of the condition that it should be lawful for said Fisher, his heirs and assigns, and the owners and occupiers of any part of the land lying, &c., to enter and abate." That there was erected a building contrary to the intent and in violation of the condition, and that defendant is owner under Fisher, and occupier of part of the land lying, &c., and as such owner and occupier, he entered and abated, which is the trespass complained of.

Plea 3d was like the first, with the additional averments, that Fisher conveyed to Maule upon the conditions mentioned in the 2d plea, and also subject to a yearly rent charge of $300, that Maule conveyed to Brugiere, in 1814, subject to the conditions and rent charge. That by an indenture of 1820, (profert) Brugiere conveyed to Klosser, subject to the aforesaid conditions, under whom plaintiff claims.

Replication to 2d and 3d pleas to 1st count.—That after the

conveyance by the said Samuel W. Fisher to the said Israel Maule, of the premises in the declaration mentioned, the estate of him, the said Israel Maule, became, and was by lawful conveyances, vested in one Charles Brugiere, who thereby then and there was seised in his demesne, as of fee, of, in and to the same, subject to the said conditions in the said pleas mentioned. And that, whilst the said Charles Brugiere was so seised thereof, and whilst the said Samuel W. Fisher continued to be seised and possesed of the residue of his lot, as of the same estate he had therein at the time of the convey-ance aforesaid by him to the said Israel Maule, he, the said Samuel W. Fisher, by indenture, dated the 31st day of August, 1814, sealed with his seal, (profert) did grant, bargain, sell, assign, release and extinguish unto him, the said Charles Brugiere, his heirs and assigns, all the estate, right, title and interest of him, the said Samuel W. Fisher, in the said premises so as aforesaid conveyed by him to the said Israel Maule, and by the said Israel Maule to the said Charles Brugiere, and this he is ready to verrify, &c.

Rejoinder.—That by the deed of the 31st day of August, 1814, of Samuel W. Fisher to Charles Brugiere, the conditions set out in the said plea were not extinguished or discharged. And of this the said defendant puts himself on the country.

Demurrer:—causes—that the said rejoinder does not traverse any material averment or matter of fact put in issue by the replication, but traverses a supposed conclusion or inference of law from the facts set forth in the replication. 2. That the rejoinder seeks to put in issue matter of law, viz. the effect of a certain indenture or deed mentioned in the replication. 3d. That it is irregular, unusual and improper, and presents no issue of fact on which the plaintiff can go to trial; that if it was intended to question the effect of the conveyance set up in the replication, the regular and proper course would have been to crave oyer and demur, when the court could have decided the question, which apparently it is desired to raise; whereas by the course adopted, the court cannot inspect or examine the deed in the replication mentioned, nor can they see whether or not the legal effect is truly set out, or whether the conditions were thereby released. 4th. That the rejoinder is

an informal, irregular and improper demurrer, so far as it is of any account and substance, while in form it tends to mislead, and to an immaterial issue, and one which the party cannot try, and an issue which the plaintiff cannot join in with safety. 5th. Because the issue presented is uncertain whether it is intended to traverse the consequences of the conveyance in the replication mentioned, or the legal effect thereof, or the contents of the same.

McMurtrie and *John M. Read*, for the plaintiff. The rejoinder is clearly bad, as the effect of the release is a question of law, and that it is pleaded according to its legal effect, is admitted by pleading over. If it was intended to deny this, the deed should have been set forth on oyer, or the execution traversed, and objection taken for the variance. *Pollitt* vs. *Forrest*, 11 Q. B. 949; *Webb* vs. *Spicer*, 13 Q. B. 885; *Moore* vs. *Plymouth*, 3 B. & Ald. 66; *Portmore* vs. *Bunn*, 1 B. & C. 694; *Bird* vs. *Smith*, 12 Q. B. 794; *Ranington* vs. *Cannon*, 12 C. B. 18. The plea is bad as setting up by a stranger a right to enter for condition broken. Co. Litt. 203 b, 214 a, 215 a, 201, a & n 1; §§ 720, 723; 2 Prest. Convey. 201; Com. Dig. Cond. O 1; 3 Atk. 139; 3 Sug. V. & P. 467. No case has gone further than to say that the grantee of the reversion may take advantage of a condition, and there is no averment of such a grant here. Nor can there be an inference that any other estate than a condition was reserved, for it is so pleaded, and as such it was capable of operating. It is clear that the right in Fisher was capable of release, or the present defendant can have no interest, and it being admitted by the pleadings that all his estate in the premises passed to Brugiere, no one claiming under him subsequently can have any interest.

Dropsie contra. The plaintiff does not connect himself with Brugiere, to whom the release was made.

April 19, 1856.—The opinion of the court was delivered by

HARE, J.—This is an action of trespass quare clausum fregit. The declaration contains two counts. The defendant pleaded not guilty, on which issue was joined, and the plaintiff had a verdict; and also two pleas, which aver that the lot on which the alleged

trespass was committed, was originally granted by Fisher, to one Maule, subject to a condition, that the grantee should not build beyond a certain height, and that if he did, the grantor might enter and abate so much of the structure thus erected, as violated the condition. These pleas were pleaded to both counts; and were met under the first, by a replication that after the execution of the original conveyance, the land conveyed was assigned to one Brugiere, under whom the plaintiff claimed, and that while he held it under this assignment, "Fisher granted, bargained and sold, assigned, released, and extinguished, all the estate, right, title, and interest of him the said Fisher, in the said premises, to the said Brugiere." We think it unnecessary to notice the numerous and difficult questions which have been raised in this case, because we are clearly of the opinion that the release thus set forth in the replication, is an extinguishment of the condition, and consequently bars the justification which is based upon it. It is indeed said, that the words of release were not meant to have the sweeping effect which the replication attributes to them, and were intended to operate solely on a ground rent, which was reserved at the same time with the condition. This may well be so, and it may also be, that if the deed of release had been set forth in the replication, or if the defendant had craved oyer, and thus made it a part of the record, we should have held that the generality of its language, was qualified and restrained by its premises, and went no further than an extinguishment of the rent, without touching the condition. But as the matter now stands, we have no choice but to determine that words of release, as comprehensive as words can be made, must be construed in accordance with their literal meaning; and consequently, preclude the defendant from claiming anything in or out of the land, which his predecessor had thus completely exonerated and acquitted.

The replication to the pleas to the second count, we think insufficient; but do not deem it necessary to give our reasons, because our decision on those to the first count, is decisive of the right of the plaintiff to judgment on the verdict.

Judgment is accordingly entered for the plaintiff, on the first count, and for the defendant on the second and third pleas to the second count.

In the United States Circuit Court for the Eastern District of Louisiana.

CHARLES POWERS, GUARDIAN *vs.* ANDINE OLIVIA MORTEE, AND THOMAS J. MORTEE HER HUSBAND.

1. Where a resident in Louisiana died intestate, leaving two minor children surviving him, who had been placed, in the father's lifetime, in the care of an uncle in the State of New York, and he having, after the father's death, been duly appointed their guardian there, an application made in Louisiana by the uncle to set aside proceedings in that State appointing the grandmother tutrix will be refused; neither will the court decree a sum of money to be paid to the New York guardian for the support and education of the children.
2. Authority conferred on a guardian in New York can give him no right to come into Louisiana, and take the minor's property there, which is already in the possession of a legal tutrix.
3. The rights and duties of guardians are strictly local.
4. The domicil of the minor must follow the domicil of the father.

The opinion of the court was delivered by

McCALEB, J.—The late James Brown jr., who was for many years a citizen of this State, and a resident of the Parish of St. Tammany, departed this life on the 16th of September, 1853. He died intestate, leaving two children, viz: Adelaide Clare, aged ten years, and Emma Eliza, aged eight years, who were the only children born of his marriage with his first wife, Eliza Hosmer. He also left as widow in community Rosa Ginault, his second wife, who was pregnant at the time of his death, and who has since been delivered of a female child named, Louisa Laura. The first wife of Brown died several years before her husband. After her death, her surviving children were committed by their father to the care of their grandmother, Mrs. Mortee, one of the defendants in this action. They remained under her charge for seven or eight years, and were then taken to New York, and placed by their father under the care of the plaintiff, Charles Powers and his wife (the latter being the sister of the said James Brown), where they now remain. Since the death of the father, their grandmother, Mrs. Mortee, has demanded the possession of the children; but the plaintiff refuses to comply with the demand, upon the ground that it was the wish and request of their father that they should remain under the care and protection

of himself and wife. He alleges "that after the decease of the father, at the request of the grandfather and uncle and aunt of the said children, he applied to the Surrogate's Court, in the State of New York, and was legally appointed the guardian of the said children, who now reside with him and his wife in that State, and are supported and educated out of their own funds. The relatives at whose request this proceeding was resorted to, are the paternal grandfather, uncle and aunt of the children. The letters of guardianship were granted by the Surrogate of Richmond county, in the State of New York, on the 16th of January, 1854.

Immediately after the death of James Brown, jr., his succession was opened in the Parish of St. Tammany, and an administrator appointed. The defendant, Mrs. Mortee, being the grandmother of the minor children, and the only ascendant residing in the State of Louisiana, was by law entitled to the tutorship, and was, by an order of the Eighth District Court, appointed tutrix on the 29th of November, 1853. Her husband, by the same authority, was appointed co-tutor. They both aver that they have complied with all the requisites of the law, and have given bond and security to the satisfaction of a meeting of the friends of the family of the minors, in a sum sufficient to cover their interest in their father's estate as well as the property they inherited from their mother. They further aver, that they have thus been legally appointed to the tutorship of the said minors, and are now in the discharge of their duty in that capacity. They deny that the plaintiff Powers has any right to control or interfere with the persons or property of the said minors in any manner.

The avowed object of this action, as appears from the plaintiff's petition, is to set aside the proceedings of the Eighth District Court, appointing the defendants tutrix and co-tutor of the minors, as illegal, null and void, and to recover possession of the property belonging to the succession of James Brown, jr. or as much thereof as legally belongs to these two children. In the event of a refusal on the part of this court to grant to the plaintiff the possession of the property, he prays that the court will award a sum of money to be paid to him, from time to time, for the support and education of the children.

We have seen that the father died intestate; that although he placed the children under the care of his brother-in-law and sister in New York, there is nothing to show that he ever intended to remove to that State, and fix his permanent residence there; nor does it appear that it was his wish that the children should reside there for any other purpose than to obtain an education. The correspondence introduced in evidence, certainly exhibits great solicitude on his part, that his children should continue to remain under the care of his sister. But as this solicitude was only expressed in reference to their education, and evidently did not relate to their permanent residence, either during his own life, or in the event of his death, it is impossible to say that any change of domicil was ever contemplated. It is clear, in point of fact, that the domicil of the father was in Louisiana; and it is equally clear, in point of law, that the appointment of a tutor or curator to a minor, belongs to the judge of probates of the place of domicil, or usual residence of the father and mother of such minor, if they or either of them be living. If the father and mother be dead, the appointment shall be made by the judge of probates, at their last place of domicil; or, if they had no domicil, of the minor's nearest relations. The place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents, *patris originem unusquisque sequitur.* The domicil of birth of minors continues until they have obtained a new domicil. Minors are generally deemed incapable of changing their domicil during their minority, and therefore they retain the domicil of their parents; and if the parents change their domicil, that of the children follows it; and if the father dies, his last domicil is that of the infant children. (Dig. Lib. 50, tit. 1, l. 3, 4, Story's Conflict of Laws, 44.) It is wholly inconsistent with our law, that any one not resident in the State should be appointed a tutor to a minor whose domicil is within the State, and whose interests or property may be here situated, (C. C. 351, 5 N. S. 382;) and it is quite unnecessary, therefore, to discuss the claims of the plaintiff, or of any other relative or connexion of these minors residing in New York, to be appointed their tutor; nor is it necessary, for the purposes of a

correct decision of this case, to inquire into the legality of the appointment of the plaintiff as guardian, by the Surrogate of Richmond county, New York. The question for this court simply is, can the authority thus conferred upon the plaintiff, as guardian of these minors in the State of New York, give him a right to come into this State, and take the property already in the possession of a tutrix appointed at the place where that property is situated, and administer it for the benefit of those minors? It is clear to my mind that he has no such right. He could not by the laws of Louisiana claim the tutorship of these minors at all, and for the simple reason that he does not reside within the State where the minors have their legal domicil, and where their property is situated; and even if he were a resident of the State, his claims would not, under our law, be preferred to those of their grandmother. I am called upon to decide a question involving the right to the possession of property, according to the law of *Louisiana*, and not according to that of *New York*. Whatever may be the rights the appointment of *guardian* would confer in the latter State, it is clear that it confers no extra-territorial authority to perform acts directly opposed to the whole policy of our own laws; for who can doubt that it would be at war with the express provisions of our code, to permit a guardian residing in the State of New York to assume the administration of minors' property in Louisiana; our own legislature has prescribed rules and regulations upon this subject. It has thought proper to say *how* and by *whom* such property shall be administered; and it is sufficient to say that the plaintiff has not shown that he is within the requirements of the law.

It is well established in our jurisprudence, that when the father and mother of the minor are dead, the grandfather is entitled of right and by law, to the tutorship of the minor; and no supposed aversion of the minor towards him, can deprive him of it, that it may be given to a brother of the deceased. It is equally well established that when no tutor has been appointed *by will*, it is the duty of the judge of the court of probates, to give the tutorship to the nearest ascendant of the minor. 10 La. 541–2. In such a

case, where both parents are dead, the grandfather is entitled to letters of tutorship; and it is unnecessary to call a family meeting to authorize or sanction his appointment. Ibid. C. C. 281. In the case now before the court, it is unnecessary to consider the claims of the grandfather, inasmuch as it is not shown that either paternal or maternal grandfather has asserted any claims to the tutorship. The latter is dead, and the former is a resident of the State of New York, and could not for the reasons already adduced, from Louisiana law, receive the appointment of tutor even if he had demanded it. Under such circumstances, the grandmother, being the nearest ascendant in the direct line of the minor, residing within the State, and where the property is situated, had a clear right to claim the tutorship by the effect of the law. C. C. 281, 284.

It is impossible to perceive upon what solid ground the claims of the plaintiff in this case can rest. The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators. (*Morrill* vs. *Dickey*, 1 Johns. Chan. 153; Story's Conflict of Laws, § 499.) To authorize the plaintiff to take charge of the property of these minors, whether to administer it within this State, or to sell it and remove it beyond the reach of the *lex rei sitæ*, some higher powers than those which are necessarily incidental to his appointment of guardian, under the laws of New York, should be exhibited. If the legal domicil of these minors was in New York, there would perhaps be some ground for the claims he has asserted before the court; but we have seen that there has been no change of domicil since the death of the father, for the reason that it is not in the power of the children, during their minority, to make such a change. We have also seen that the person designated by our laws as entitled to the tutorship, has actually been appointed; and our code expressly declares that the domicil of a minor not emancipated, is that of his father, mother, or *tutor*.

But the plaintiff contends that no tutrix has been legally ap-

pointed; that the powers exercised by the clerk, as they appear from the mortuary proceedings in the court having charge of the settlement of the succession of James Brown, jr. were illegal and unconstitutional. Let us admit for a moment that this position were strictly correct—in what possible mode would the alleged irregularities operate in favor of the plaintiff? Let us suppose that Mrs. Mortee were now deprived of her tutorship, would *he*, under any circumstances, be entitled to demand of *this* court an order to put him in her place? From the view we have already taken of the law of this case, it is clear that the statement of the question would necessarily call for a negative reply.

Here I might with propriety leave the case; but my respect for the argument of the counsel for the plaintiff, has induced me to examine the Act of the Legislature of Louisiana, approved April 30th, 1853, entitled "An Act to prescribe the powers and duties of clerks of courts, the Parish of Orleans excepted." The seventy-sixth article of the Constitution of Louisiana declares that "the legislature shall have power to vest in clerks of courts authority to grant such orders and do such acts as may be deemed necessary for the furtherance of the administration of justice; and in all cases the powers thus granted shall be specified and determined." Among the powers specified and determined in the act above referred to, we find the power to administer oaths *in all cases;* to grant orders for affixing seals, taking inventories, and making petitions, and to order the execution of wills; to confirm testamentary executors; *to confirm and appoint tutors and under-tutors; to order family meetings, and homologate their proceedings, if no opposition is made thereto; to grant orders for the sale of succession property*, &c.

The powers here granted by the legislature were sufficiently ample to authorize the acts of the clerk of the Eighth District Court, in reference to the appointment of the tutrix; and so far from the legislature having transcended its constitutional authority, it seems to have possessed full power over the subject, in virtue of the constitution itself. The whole policy of the law is apparent. It is to prevent delays in the settlement of successions; to facili-

tate the ordinary proceedings for that purpose, in the absence of the judge, who is compelled to hold court in the different parishes composing his district, and who cannot, therefore, be present at the various places where the courts are held, to grant such orders as are indispensably necessary for the speedy and proper administration of justice. If the clerk should commit errors and irregularities, in the exercise of the powers specifically conferred by law, the parties aggrieved have their remedy by an opposition, which would bring the errors complained of before the judge for revision.

A full consideration of the merits of this case, has led me to the conclusion that the plaintiff is not entitled to the relief he seeks at the hands of this court, and that his petition must be dismissed with costs.

A judgment of dismissal must be entered accordingly.

In the Superior Court of Baltimore City.

HENRY RIEMAN & SONS *vs.* WILLIAM FISHER.

1. A public note or bill-broker who sells a note, impliedly warrants the genuineness of the signatures and endorsements; and should the bill prove to be forged, the loss must fall upon the vendor.
2. A public broker must be regarded as the principal in his business transactions, unless he discloses his agency at the time of the sale.
3. The case of Baxter *vs.* Duren, 29 Maine, 440, denied.

The opinion of the Court was delivered by

LEE, J.—This is an action to recover from the defendant, William Fisher, a sum of money which the plaintiffs paid for a promissory note sold to them by the defendant, and they seek to recover it back, on the ground that the note, when sold, was not genuine, the name of the drawer and one of the endorsers being forged; and upon the trial the plaintiffs, to support the issue on their part, produced the promissory note, purporting to have been made by Edward Dunn, in favor of Jacob F. Kridler, and endorsed by said Kridler and

Henry Shirk, for $861, payable eleven months after date, and dated Baltimore, February 1, 1854. They further proved, by a competent witness, that they purchased said note from the defendant Fisher, who was a public bill and note broker in the city of Baltimore, (and who dealt in having notes discounted or sold,) for the sum of $651 08; and also proved that the defendant was generally known in the city as a public bill and note broker, largely engaged in the selling of bills, notes and stocks, and that the plaintiffs had frequently bought the promissory notes of other persons from said defendant, before the purchase by the plaintiffs of the note in this case.

That the defendant was in the habit of bringing to the counting-room of the plaintiffs a large number of notes at a time, for the purpose of selling them to the plaintiffs, before the sale of the note in question.

And the plaintiffs further proved, by Edward Dunn and Henry Shirk, that their names, written upon the said note as maker and endorser, were not in their handwriting, but were forged; but that the name of Jacob F. Kridler, written in two places on the back of said note, was his genuine handwriting; and that Kridler was a man in good credit in the city of Baltimore down to the 27th of November, 1854, when he absconded, having committed other forgeries; and that said Kridler left some property behind him, upon which there are mechanics' liens.

The defendant, on his part, gave in evidence, by a competent witness, (his clerk,) that at the time of the sale by the defendant to the plaintiffs of the note in question, Kridler was in the habit, before this time, of putting into the hands of Fisher, as a bill and note broker, for the purpose of sale on account of said Kridler, various notes held by Kridler, and endorsed by him; but the particular notes were not named or recollected by the witness; and also proved that the defendant is a public bill and note broker in the city for all persons who may employ him for that purpose, handing over to such persons the proceeds of sale of such notes as he sells, less the commissions charged for such sales; and that the proceeds of sale of the note now in question were paid by the

defendant to his principal who employed him to sell it, before the alleged forgery of the names of Dunn and Shirk upon the said note was suspected, either by the plaintiffs or defendant.

Upon these facts the plaintiffs, by their counsel, asked an instruction from the court that they were entitled to recover in this suit; and counter instructions were prayed by the defendant.

I am aware that the question is an interesting one, and for the first time raised in this State, as to the liability of a public note or bill broker for the genuineness of a note or bill sold by him—he at the time being ignorant of the fact; in other words, both the plaintiffs and the defendant in this case are shown to have been innocent parties, and ignorant of the forgeries on the note in question at the time the sale of it was made. Who shall, in such a case as this, bear the loss?

It has been contended at the bar that the defendant, a public bill broker, should be regarded as the principal, or that in selling the note, even as agent, there was, on his part, an implied warranty to the vendees (the plaintiffs) of the note being what it purported to be, a valid and genuine note; that the sufficiency or solvency, or ability of the parties to the note, was the risk which the vendees encountered, but in the event of the note's being false and forged, the vendor should bear the loss.

On the other hand, it is insisted by the defendant that, as the plaintiffs in this case had dealt with him as a broker, and knew the business which he was engaged in, which was the disposing by sale of notes on account of other parties, that they should have known or presumed he was an agent, and acted with him as such in the sale of notes.

English and American authorities have been cited, which, I think, apart from a sound rule of public policy, determine the liability of the proper party here; and without referring particularly to all the authorities, I will name the last leading case in England, of *Gurney et al.* vs. *Wirmbsly et al.*, decided as late as November, 1854, by the Court of Queen's Bench, in which Lord Campbell decides that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and if it turns out that

the name of one of the parties to it is forged, he is liable to the vendees.

The defendants in that case were bill brokers, who received the bill to be discounted, and took it to the plaintiffs, who were money lenders, with whom the defendants, as bill brokers, had previously had similar dealings; the defendants did not disclose their principal, and were regarded as principals; and it was held by the court, all the judges concurring, that they were liable, and the plaintiffs should recover back the amount paid by them for the forged bill. Lord Campbell, at page 259 of vol. 28 of English Law and Equity Reports, says: "Here that which *purported* to be the acceptance of one of the parties to the bill, and upon which the plaintiffs gave credit and relied, was a forgery, and of no value whatever; in fact the instrument altogether became of no value, for Anderson was a bankrupt; there was, therefore, clearly a failure of consideration, entitling the plaintiffs to recover."

The case at bar is like the case decided by Lord Campbell, and the same rule should apply, in my opinion, to its determination.

No decision in England, before or since, is in conflict with that decision; and I will now refer to one or two American cases, read at the bar, from which it will be seen that, except the case of *Baxter* vs. *Duren*, in 29 Maine Reports, (chiefly relied on by the defendant here,) no authority can be found to impair or conflict with the judgment of Lord Campbell. In the case of the *Canal Bank* vs. *The Bank of Albany*, 1st Hill Sup. Court Reports of New York, page 290, Judge Cowen, in substance, affirms the doctrine established by Lord Campbell, and says, "no doubt the parties are equally innocent in a moral point of view; it was the duty, or more properly a measure of prudence in each to have inquired into the genuineness of the note; they (the defendants) have obtained the plaintiffs' money without consideration, and the plaintiffs have a right to recover (though there was ignorance on both sides of any forgery;) that was a case of forged bank notes passed by the defendants to the plaintiffs. Other decisions in Massachusetts and New York sustain the same view. But the case of *Baxter* vs. *Duren*, 29 Maine, p, 440, is invoked to establish a different rule

from that laid down by Lord Campbell, and confirmed by many American authorities. (See cases referred to in Story on Bills.) With entire respect for the court, it will be found, on examining the authorities upon which it rests its decision in *Baxter* vs. *Duren*, at page 441, that they do not sustain the doctrine of the learned Judge: viz. "that where no debt is due or created at the time, and the paper is sold as other goods and effects are, the purchaser cannot recover from the seller the purchase money. There is in such case no implied warranty of the genuineness of the paper; the law respecting the sale of goods is applicable; the only implied warranty is, that the seller owns or is lawfully entitled to dispose of the paper or goods." If this be the true rule, which I respectfully submit cannot be sustained by authority or on principles of public policy, then in no event could a bill broker be liable, either as principal or agent, if no implied warranty attaches, unless where the note is paid away for a previous debt or in payment of goods, etc.

A public broker, like the defendant in this case, must be regarded as the *principal* in all his business transactions, unless he discloses his agency at the time.

How is he otherwise an agent, and whose agent is he? To illustrate the force and justice of this doctrine, as sanctioned by the Court of Queen's Bench, and by Justice Story, suppose a bill broker sells a coupon bond, for instance, which is transferred by delivery only without an endorsement or formal transfer, and it turns out to be a forgery, can it be maintained that he is not responsible for the genuineness of the bonds; and can the fact of his being known to be a general agent relieve him, if at the time of the sale he did not disclose the principal or party for whom he was agent in this particular transaction? The answer is conclusive and his liability certain. To relieve himself, therefore, in a case like this, from responsibility, he should have disclosed his principal. This can be the only safe rule, which, it will be found, is sanctioned by Judge Story in his learned work on Promissory Notes and Agency. A contrary doctrine carried to the extent of the case in *Baxter* vs. *Duren*, in 29 Maine Reports, would open the door to fraud, gross injustice and commercial inconvenience.

Judge Story, in his admirable Treatise on Promissory Notes and Bills of Exchange, at page 132, forcibly states the doctrine as it now stands supported by the highest authority in England and this country, and by principles of sound reason and public policy. He says: unless it be expressly otherwise agreed, the holder transferring a note is not exempt from all obligations and responsibilities, but he incurs some, although they are of a limited nature. In the first place *he warrants by implication* (unless otherwise agreed) that he is *a lawful holder and has a just and valid title to the instrument, and a right to transfer* it by delivery, for this is implied as an obligation of good faith.

In the next place, *he warrants in like manner that the instrument is genuine, and not forged or fictitious.* (It will be found stated, not as a part of the learned author's text, but inserted by the editor in brackets, that the case of *Baxter* vs. *Duren*, in Maine Reports, was decided otherwise.) But Judge Story does not adopt or sanction the decision; on the contrary, refers in the notes to his work to authorities directly in conflict with it.

Hard as in the present case the rule may operate, yet it is *the only* one which can determine with safety the duties and obligations of parties to a transaction like this.

If the plaintiff and defendant acted as is conceded, in good faith and in ignorance of the forgery, then the loss must fall on the vendor; he is nearest the inception of the transaction, and if acting as principal, must be clearly *liable*, if he disposes or sells an invalid bill or forged note; or if acting as agent, he must be presumed to know the party who employed him, and the circumstances of the case; at all events, as principal or agent, he comes under an implied guarantee or warranty to the vendee of the *genuineness of the paper sold*, unless he discloses at the time his principal, if he acts as an agent.

Entertaining these views, I am of opinion that the defendant is liable in this action, and that a verdict ought to be entered for the plaintiffs here. I give the jury the following instruction:

That if they find from the evidence that the defendant sold to the plaintiffs the paper offered in evidence by the plaintiffs, purporting to be the promissory note of Edward Dunn, in favor and